

**Family Law Update
Cases Decided Between
September 21, 2010 through June 7, 2011**

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**Court opinions can be found on the website of the N.C. Administrative Office of the
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Divorce

Cases Decided September 21, 2010 and June 7, 2011

Residency requirement

- Trial court order did not err in concluding plaintiff had been a resident of North Carolina for at least 6 months before filing the complaint for divorce.
- Residence for purposes of divorce means physical presence in NC as well as an intention to make NC home for an indefinite period of time.
- While GS 50-18 establishes that military personal stationed in NC for at least six months are considered residents for purposes of jurisdiction, an intent to make NC home must still be established.

Huston v. Huston, unpublished opinion, _S.E.2d_ (N.C. App., May 17, 2011). Plaintiff filed for absolute divorce while stationed at Fort Bragg. Defendant argued that plaintiff had not been a resident of NC for at least six months before filing as required by GS 50-8 because his domicile was Georgia. Trial court disagreed and the court of appeals affirmed. Court of appeals held that an action for absolute divorce requires a showing of residency. Residency is established by showing both a physical presence in NC and the intent to make NC home for an indefinite period of time. The court held that plaintiff's intent was established by evidence that he lived in NC for at least six months before filing, the parties owned real property in NC, plaintiff had a NC driver's license and his vehicles were registered in NC, he paid real and personal property tax in NC, and he testified that it was his intent to remain in NC indefinitely. The court of appeals held that GS 50-18 does not eliminate the requirement that a military plaintiff must satisfy the intent to remain element of the residency requirement, even though that statute provides that a person stationed in NC for at least six months in connection with their military duties satisfies residency requirements for purposes of personal jurisdiction.

Equitable Distribution

Cases Decided September 21, 2010 and June 7, 2011

Findings of fact required to support unequal distribution

- Trial court order did not contain adequate findings of fact to support valuation and distribution.
- It was error for trial court to order an unequal distribution based on the conclusion that “an unequal distribution is equitable” because a conclusion that “an equal distribution is not equitable” is necessary to show court gave appropriate consideration to presumption that equal is equitable.

Lucas v. Lucas, 706 S.E.2d 270 (N.C. App., February 15, 2011).

Court of appeals held that order was not sufficient to show that the “trial court gave proper consideration to the policy favoring an equal division of the estate” where order concluded that an unequal division was equitable rather than concluding an equal division was not equitable and explaining why. The court of appeals also held that the order contained insufficient findings to show the value of certain marital and divisible assets, and was ambiguous about which party received which marital asset. Stating that the distribution made by the trial court may be “perfectly appropriate,” the court of appeals held that remand was required because additional findings of fact were necessary to allow meaningful appellate review.

Divisible property

- Trial court erred in failing to classify the postseparation diminution in value of two retirement accounts that were marital property on the date of separation.
- Trial court did not err in failing to classify a check for \$2,200 from an insurance company as marital property because the check was used to pay for repairs to roof on marital residence. Because the money was used to repair and maintain the value of other marital property, it was not appropriate to classify the money as a separate marital asset.

Cheek v. Cheek, _S.E.2d_ (N.C. App, April 19, 2011). On appeal of equitable distribution order, defendant argued that the trial court erred by failing to classify the significant postseparation diminution in value of her two retirement accounts as divisible property. The court of appeals acknowledged that any reduction in the value of marital property after the date of separation is presumed to be divisible property, with the burden being on the person arguing against the divisible classification to show that the loss of value was due to the actions of one spouse after the date of separation. The court of appeals held that evidence was presented which indicates defendant may have contributed to the loss in value of the accounts by selling stock held in the accounts, moving money to a different account with a different firm, and purchasing/trading with the resulting funds. The court of appeals remanded to the trial court with instruction to classify the reduction based upon the evidence presented. In addition, defendant argued that the trial court should have classified and valued a check in the amount of \$2,000 paid

to the parties by the homeowner's insurance policy covering the marital residence. According to the court of appeals, the trial court was correct when it concluded that the check was paid to cover the cost of repairs to the roof of the house in order to maintain the value of the house. Therefore, the trial court properly refused to consider these funds "as a piece of marital property distinct from the value of the house itself."

Findings required for classification and valuation; oral stipulations are not binding

- Trial court erred when it failed to find facts supporting the classification and valuation of the assets distributed in the equitable distribution order.
- Fact that record showed evidence was introduced at trial to support classification and valuation did not relieve trial judge of responsibility to make all required findings of fact in the order.
- Trial court erred in relying on attorney's statement in court that parties had stipulated to the division of personal property because oral agreements concerning property division are not enforceable.

Robinson v. Robinson, 707 S.E.2d 785 (N.C. App, March 15, 2011). Plaintiff filed action for ED. Defendant was served and filed an answer but did not attend the trial. Following entry of the ED order, defendant appealed and argued that the order did not contain sufficient findings of fact to support the trial court's distribution. The court of appeals agreed, finding that the order did not contain any information pertaining to the classification or valuation of the assets and debts distributed. The court of appeals noted that the record showed evidence was introduced at trial to support the classification, but held that the trial court must make the required findings rather than the appellate court. The court of appeals also held it was error for trial court to distribute personal property based on plaintiff's statement in court that the parties had agreed to the distribution. Agreements regarding property distribution must be in writing to be enforceable.

Spousal Agreements

Cases Decided September 21, 2010 and June 7, 2011

Damages for breach of property settlement agreement

- Trial court did not err in awarding defendant \$60,000 as damages for plaintiff's failure to return personal property as required by the agreement, \$1,000 for plaintiff's trespass on defendant's property, \$93,000 for lost business profits incurred due to plaintiff's failure to return the property, and \$2,500 for damages incurred by defendant when plaintiff cancelled a credit card in violation of the agreement.
- Case had to be remanded to trial court where trial court failed to specify legal basis for permanent injunction restraining plaintiff from harassing or abusing defendant.

Kittredge v. Hegney, unpublished, 699 S.E.2d 685 (N.C. App., October 5, 2010).

Parties entered into Separation Agreement, which court of appeals determined to be a Property Settlement Agreement. Plaintiff filed action claiming defendant breached the agreement and defendant counterclaimed for damages based on plaintiff's breach. The trial court denied plaintiff's claims but found defendant was entitled to recover for breaches by plaintiff. Plaintiff argued on appeal that the trial court erred in the amounts ordered as compensation but the court of appeals affirmed. The appellate court found that the amounts were supported by evidence of the value of the items of personal property plaintiff failed to return to defendant as required by the agreement, by the cost of repairing doors in defendant's house damaged as a result of the trespass, the lost business profits defendant incurred because plaintiff failed to return personal property required for defendant's business, and amounts defendant was required to pay when plaintiff cancelled a credit card the agreement required him to maintain for defendant. However, the court of appeals remanded the case for reconsideration by the trial court of the permanent restraining order entered enjoining plaintiff from further contact with defendant. The court of appeals stated the remand was necessary "because we cannot determine pursuant to what authority the trial court entered its permanent restraining order ... Upon remand, we direct the trial court to state the statutory authority for any restraining order it may grant, and to include such findings and conclusions sufficient to show that any restraining order granted by the trial court complies with the requirements of the statutory authority under which it is granted."

Ratification of agreement by accepting benefits

- Trial court did not err in granting partial summary judgment to defendant after concluding that plaintiff could not succeed on her claim for rescission of property settlement agreement because she had ratified the contract by receiving and retaining substantial amounts of property pursuant to the agreement after she alleged defendant had failed to disclose assets at the time the agreement was executed between the parties.

Honeycutt v. Honeycutt, 701 S.E.2d 689 (N.C. App., November 16, 2010).

Plaintiff filed action seeking to rescind property settlement agreement based on her allegation that defendant failed to disclose significant assets before the agreement was executed. Trial judge granted summary judgment to defendant on issue of rescission and court of appeals affirmed. According to the court of appeals, if a party receives benefits under agreement after discovering grounds for rescission, that party has ratified the agreement and is not entitled to rescission.

Court of appeals held ratification had occurred even though plaintiff offered to return all property she had received under the agreement.

Ratification of agreement by accepting benefits

- Trial court did not err in granting partial summary judgment to plaintiff after concluding that defendant could not succeed on his claim for rescission of property settlement agreement because he had ratified the contract by consenting to the entry of a domestic relations order dividing plaintiff's retirement fund in accordance with the executed agreement.

Rolls v. Rolls, unpublished, 706 S.E.2d 842, (N.C. App., December 21, 2010). Plaintiff filed action for divorce and defendant filed counterclaim seeking to rescind property settlement agreement based on his allegation that plaintiff failed to disclose significant assets before the agreement was executed. After filing the counterclaim, the parties consented to entry of a domestic relations order dividing plaintiff's IRA, as required by the property settlement agreement. Trial judge granted summary judgment to defendant on issue of rescission due to defendant's ratification of the contract and court of appeals affirmed. The court of appeals held that by accepting the benefits of the contract in the form of the divided IRA after discovering the alleged failure by plaintiff to disclose assets, defendant ratified the contract.

Sealing court records; blocking access of public to court proceedings; appeal of interlocutory orders

- Trial court order directing Clerk of Court to unseal court documents that had been sealed pursuant to an earlier court order was an interlocutory order affecting a substantial right.
- Appropriate interlocutory appeal divests the trial court of jurisdiction in the matter appealed and any order entered by the trial court following the appeal are invalid.
- Clause in separation agreement providing that all court records in cases filed by the parties would be sealed and all court proceedings arising out of the separation and divorce of the parties would be closed to the public violates public policy and is not binding on the trial court.
- Before closing court proceedings to the public in cases where a statute does not specifically authorize closing, a trial court must find there is a compelling countervailing public interest as related to the particular parties in a case which outweigh the public's right to open court proceedings.
- Trial court did not err in concluding that the parties to this fairly typical domestic dispute had failed to show a countervailing public interest particular to their specific case that was sufficient to outweigh the public right of access to court proceedings.

France v. France, 705 S.E.2d 399 (N.C. App., February 1, 2011). Parties entered into a separation and property settlement agreement. Agreement included a clause stating that both parties agreed to keep confidential all information regarding their children and their financial circumstances. The agreement further provided that the parties would use their best efforts to keep all court records sealed and all court proceedings closed in the event either instituted litigation relating to their separation and divorce. Plaintiff subsequently filed a complaint, asking for a court order sealing any court record created as a result of any future litigation between the parties. An order was entered sealing all records. Subsequently, plaintiff filed a second action

alleging defendant breached the separation agreement and asking the court to rescind the agreement. In addition, plaintiff filed a motion asking the court to close all court proceedings to the public and defendant joined in that request. The trial court denied the request, holding that neither party had shown a public policy implicated by this particular case that would outweigh the presumption in favor of permitting public access in all court proceedings. Plaintiff appealed the order. Subsequent to the appeal, the local newspaper filed a motion in the matter “to determine public access to judicial proceedings and documents.” The newspaper requested that the judge unseal all court records and allow public access to proceedings. The trial court granted both requests, finding no evidence sufficient to justify the restriction on access.

The court of appeals first addressed the appeal of the order granting the request by the newspaper that court documents be unsealed and court proceedings be open. The court of appeals held that the trial court had no jurisdiction to enter that order due to the earlier appeal by plaintiff of the first trial court order denying the request by plaintiff and defendant to close the court proceedings. According to the court of appeals, the interlocutory appeal of that order was an appropriate interlocutory appeal because the order of the trial court affected a substantial right. And, an appropriate interlocutory appeal divests the trial court of jurisdiction to enter further orders as long as the case is before the appellate court.

However, the court of appeals upheld the first order of the trial court denying the request by the parties to close all court proceedings and the court of appeals upheld the trial court’s determination that the court proceedings should be open. According to the court of appeals, an agreement such as the one in this case regarding access to court records and proceedings violates the “qualified constitutional right on the part of the public” to access to court records and court proceedings and is not binding upon the court. In order to rebut the presumption in favor of public access, a litigant must show that the right of the public to access is outweighed by a countervailing public interest. In this case, the court rejected plaintiff’s arguments that both the parties’ right to contract for confidentiality and the needs of their children to be protected during the litigation process were sufficient countervailing interests. The court appeals noted that while trial courts do have discretion to close proceedings in certain circumstances when it is necessary to protect a minor child, there is no basis to close the proceedings simply because evidence relating to a minor child may be introduced during a hearing.

Postseparation Support and Alimony

Cases Decided September 21, 2010 and June 7, 2011

Dependent and supporting spouse; ordering payment of future bonuses; attorney fees after ED distribution of assets

- Conclusion that a party is a dependent spouse is supported by factual finding that the spouse has an “income-expense deficit”.
- Conclusion that a party is a supporting spouse is supported by factual finding that the spouse has an “income-expense surplus”.
- Trial court did not err in ordering supporting spouse to pay a base amount of alimony plus 50% of any bonus received in the future, not to exceed a total each year equal to dependent spouse’s reasonable expenses at the time of trial.
- Trial court did not err in awarding attorney fees even though dependent spouse had received substantial assets in ED and still had \$75,000 available in cash at time of alimony trial.

Webb v. Webb, unpublished, 700 S.E.2d 248 (N.C. App., October 19, 2010).

Trial court determined former wife had reasonable needs in amount of \$9,000 per month and income of \$866 per month, giving a total need deficit of \$97,608 per year. The trial court also found former husband had monthly net income in amount of \$13,775 with reasonable monthly expenses in the amount of \$9,000. The court of appeals held these findings sufficient to support conclusion that wife was a dependent spouse and husband was supporting spouse. Court of appeals also upheld trial court order of permanent alimony for wife in amount of \$5000 per month plus one-half of any bonus received by husband at any time in the future, up to an amount not to exceed total annual payments to wife of \$97,608. The court of appeals held that this award was based on husband’s actual present income because his base salary was set at gross \$200,000 per year plus 10% of company earnings to be paid as bonuses. Finally, the court of appeals upheld the trial court award of attorney fees to wife based on the conclusion that she did not have the means to defray the cost of the litigation. The court rejected husband’s argument that wife could have used the substantial assets she received in equitable distribution to pay attorney fees. The trial court found that after paying debts and expenses, wife had \$75,000 in cash at time of alimony trial. Court of appeals upheld trial court conclusion that wife should not be required to deplete her estate to pay attorney fees when supporting spouse had ability to pay them.

Findings of fact required to support judgment; health insurance as part of award; appeal while attorney fee issue still pending

- Trial court order may be “perfectly appropriate”, but without proper findings of fact, the appellate court must remand the matter to the trial court.
- Appeal of alimony order was proper even though attorney fee issue was still pending before trial court.
- Trial court has authority to order that supporting spouse provide health insurance for dependent spouse as part of an alimony award.

- Alimony order concluding a party committed acts of marital misconduct must be remanded where the order did not include findings of fact showing what type of marital misconduct occurred.

Lucas v. Lucas, 706 S.E.2d 270 (N.C. App., February 15, 2011). Defendant husband appealed equitable distribution and alimony order and judgment. The court of appeals first determined that the appeal of the equitable distribution and alimony awards was appropriate even though the issue of attorney fees based upon the alimony statute remained unresolved by the trial court. The court of appeals applied the test recently adopted by the North Carolina Supreme Court in *Bumpers v. Cmty. Bank of N. Va.*, 364 N.C. 195 (2010) to determine whether the appeal was appropriate. According to *Bumpers*, a judgment may be final for purposes of appeal even though a claim for attorney fees remains pending when the claim for attorney fees “under a particular statute is not a substantive issue, or in any way part of the merits of the complaint.” The court of appeals held that because the award of fees pursuant to G.S. 50-16.4 “is contingent upon the claimant prevailing on the alimony claim, we conclude that a GS 50-16.4 claim is not a substantive issue, or in any way part of the merits of a claim under GS 50-16.3A.” Therefore, an unresolved claim for attorney fees in an alimony case does not preclude an appeal of the alimony judgment.

Regarding the substance of the appeal, the court of appeals stated “[t]his appeal demonstrates the importance of adequate findings of fact to permit proper appellate review. Without findings of fact setting out the basis for a trial court’s decision, we are unable to determine whether that decision is supported by the evidence, whether it is consistent with case law, and whether it amounts to a reasonable exercise of the trial court’s discretion. *The order may be perfectly appropriate, but without proper findings of fact, we are not in a position to make that determination.*” The court of appeals rejected defendant’s argument that the trial court lacks authority to order a supporting spouse to provide health insurance coverage as part of an alimony award. However, while a trial court has the authority to include such a provision as part of “maintenance and support”, the alimony order must contain findings of fact to show why such an award is equitable and otherwise appropriate under the circumstances of the case. The court of appeals suggested including facts to show the reason plaintiff needed coverage, defendant’s ability to maintain the coverage, the cost of the policy, plaintiff’s options to obtain insurance from another source, what type of coverage needed to be provided, and whether defendant could afford to provide the coverage. In addition, the trial court order failed to include findings to support the conclusion that defendant has committed acts of marital misconduct (no indication in the order of what type of marital misconduct defendant committed) and failed to include findings necessary to explain the duration of the alimony payments.

Old alimony statute: modification after termination date

- Trial court erred in modifying alimony order entered in 1994 by ordering payments to resume in 2010 when the payments had terminated in 1998 in accordance with the terms of the original order. Decision based on interpretation of alimony statute before the 1995 amendments.

Cathey v. Cathey, 707 S.E.2d 638 (N.C. App, March 1, 2011). Alimony order entered in 1994 required plaintiff to pay defendant \$500 per month for a period of 44 months. Order justified in part by fact that defendant would receive \$500 per month from plaintiff’s military retirement pay pursuant to an order of equitable distribution. By 2008, plaintiff’s retirement pay had decreased

due to his increased disability rating and defendant's share had been reduced to \$125.50 per month. Defendant filed a motion to modify the alimony order due to the change in the financial circumstances of the parties. The trial court modified the order by requiring plaintiff to pay \$300 per month until the death, cohabitation or remarriage of defendant. The court of appeals held that the trial court erred in modifying the order because the payments had terminated 44 months after entry of the alimony order. According to the court of appeals, because the pre-1995 alimony statute did not expressly authorize periodic payments for a set period of time, the original order was interpreted by the appellate courts at that time to be an order for a lump sum payment of support. And, according to the appellate opinions at the time, a lump sum payment could not be modified after it had been fully satisfied. Therefore, the court of appeals reasoned that the alimony obligation of plaintiff was 'terminated' after the 44 months of payments and could not be revived by the trial court because that would be creating a new alimony award rather than modifying an existing order. Court of appeals opinion does not say whether result would be the same under the present alimony statute.

Consideration of ability to pay, child-related expenses, and the payment of debt after separation; attorney fees

- Trial court is not required to make a specific finding that a supporting spouse has the ability to pay alimony amount awarded.
- While trial court can consider child support expenses paid by both the supporting spouse and the dependent spouse, trial court should not credit the dependent spouse with actual expenses of children while crediting supporting spouse only with guideline amount of support.
- Payments made by supporting spouse after separation should not be considered as alimony if the payments were made toward marital debt, but should be considered if made for the personal expenses of the dependent spouse.
- When order addresses ED, alimony and child support, trial court must specify amount of fees attributable to alimony and support to ensure no fees are awarded for services rendered on the ED claim.

Robinson v. Robinson, 707 S.E.2d 785 (N.C. App, March 15, 2011). Plaintiff filed action for ED, alimony, child support and attorney fees. Defendant filed an answer but did not attend hearing. Trial court awarded plaintiff \$1900 per month for 18 years. On appeal, defendant argued that the trial court erred by failing to include a finding in the order that he had the ability to pay the amount awarded. Court of appeals held that while the ability of the supporting spouse to pay the amount ordered is a "critical issue" when determining the amount of alimony, a trial court has no obligation to make a specific finding as to ability to pay. The court of appeals held that the trial court must make findings about all of the factors listed in GS 50-16. 3A, including findings about the reasonable expenses of the supporting spouse and his income. According to the court of appeals, a trial court can apply "his own common sense and everyday experiences" to determine an amount of alimony that is "affordable" based on the evidence of reasonable expenses and income. The court of appeals held that the trial court did err, however, in considering the actual expenses plaintiff incurred on behalf of her children living in the residence when crediting defendant only with the guideline amount of support obligation. In this case, plaintiff's actual expenses exceeded her guideline obligation. The court of appeals held that while it is appropriate to consider the expenses related to children residing in the home, fairness

requires that the trial court use the same measurement of expenses for both parties. Defendant also argued that the trial court should have counted the postseparation payments he made toward the car debt and the mortgage as alimony. The court of appeals remanded the issue after concluding that the ED portion of the order did not classify the car debt and the mortgage. The court of appeals held that if they payments were the postseparation payment of marital debt, the payments would be dealt with in ED and would not constitute alimony. However, if the payments were for plaintiff's "personal expenses or to make payments on her separate debt," they would be considered alimony.

Court of appeals also remanded award of attorney fees. Trial court order made findings as to total attorney fees incurred by plaintiff and based the attorney fee award on those findings. The court of appeals held that because fees cannot be awarded for the ED claim, the trial court order must make specific findings to show the amount of the fee associated with alimony and support and base the award of fees only on the time associated with alimony and child support.

PSS claim filed before separation

- Trial court did not err in dismissing plaintiff's claim for PSS after concluding that the court has no subject matter jurisdiction to consider a claim for PSS when the parties continue to reside together in the same household.

Baumann-Chacon v. Baumann, _S.E.2d_ (N.C. App, May 17, 2011). Parents resided together with two children when plaintiff mother filed a complaint for custody, child support, postseparation support, alimony and attorney fees. The trial court concluded that it had no subject matter jurisdiction to address any of those claims before the parties actually separated. The court of appeals held that the trial court has jurisdiction to consider child custody and child support before the parties separate, but the trial court has no jurisdiction to address PSS. The court of appeals held that it would not address alimony due to the fact that plaintiff did not specifically challenge the portion of the trial court order dismissing the alimony claim. According to the court of appeals, the postseparation support statute GS 50-16.2A "clearly presupposes that the parties have already separated", meaning there is a clear legislative intent obvious from the statute that the General Assembly intended PSS to be available only after separation of the parties.

Pleading alimony claim

- Trial court erred in dismissing plaintiff's claim for alimony. Complaint was sufficient to state a claim.

Quesinberry v. Quesinberry, _S.E.2d_ (N.C. App, April 5, 2011). Trial court dismissed plaintiff's claim for alimony after concluding that plaintiff did not allege facts in his complaint sufficient to state a claim. The court of appeals disagreed, finding the allegations in the complaint were sufficient to "give fair notice of the grounds for the alimony claim" as required by Rule 8 of the Rules of Civil Procedure. The court of appeals held that complaints for alimony must allege facts to show dependency, that other spouse is supporting, and that an award of alimony is equitable under the circumstances. In this case, husband alleged facts showing he had a shortfall between his expenses and his income, that wife received a steady income and was able-bodied whereas he was disabled, that he had worked in the marital business without compensation during the marriage, and that wife had possession and control of the marital business and was receiving regular income from it.

Custody

Cases Decided September 21, 2010 and June 7, 2011

UCCJEA; jurisdiction to consider TPR when another state had entered custody order

- Trial court did not have subject matter jurisdiction to consider termination of respondent's parental rights when Pennsylvania had entered custody order regarding the children and petitioner continued to reside in Pennsylvania.
- While North Carolina would have jurisdiction to act if Pennsylvania determined either that it no longer had continuing, exclusive jurisdiction under the UCCJEA or that North Carolina is the more convenient forum to exercise jurisdiction, the Pennsylvania court must actually enter an order making that determination before a court of this state can exercise jurisdiction.

In re: K.U., S.G., D.L.L.G., and P.T.D.G., 702 S.E.2d 103 (N.C. App., November 16, 2010).

Respondent mother appealed trial court order terminating her parental rights. Court of appeals agreed with respondent that North Carolina courts had no subject matter jurisdiction to consider the TPR pursuant to the UCCJEA because respondent continued to reside in Pennsylvania. Pennsylvania had entered a custody order with respect to respondent's children before the children moved to North Carolina. When the TPR proceeding was initiated in North Carolina, respondent was incarcerated in Pennsylvania. Because respondent mother continued to reside in Pennsylvania, North Carolina could exercise modification jurisdiction regarding the children only if the Pennsylvania court ruled it no longer had continuing exclusive jurisdiction or unless the Pennsylvania court determined that North Carolina was a more convenient forum to exercise jurisdiction. While the record in this case indicated that the trial judge had contacted the Pennsylvania court and had been informed that Pennsylvania no longer wished to retain jurisdiction, there was no order entered by the Pennsylvania court making one of the required determinations. Therefore, the TPR order entered by the trial court was void for lack of subject matter jurisdiction.

Consent orders; standing to intervene; jurisdiction for infants

- Trial court should not enter a custody order without a hearing, even if trial court believes defendants have not filed an answer or made an appearance.
- Allegation that child had lived with nonparent third parties for 6 months and that the parties had "bonded" with child were insufficient as a matter of law to show parties had a relationship in the nature of parent-child sufficient to support finding that parties had standing to seek custody of child.
- Where evidence showed that child was born in Nevada and was moved to NC when he was one month old, NC was not the home state of the child when consent order was signed in NC granting custody of child when child was 3 months old. UCCJEA provides that the home state of a child less than 6 months old is where the child has resided since birth.

Bohannon v. McManaway and Murray, 705 S.E.2d 1 (N.C. App., December 21, 2010).

Case is very difficult to follow from a procedural point of view and most of the decisions made by the court of appeals in this case are relevant only to the very unique circumstances of this case. However, there are three holdings with broader implications. First, court of appeals held that the trial court erred in signing an order presented to the court during calendar call granting

'permanent' custody to plaintiffs. Even though plaintiff's informed judge there had been no Answer filed by defendants and defendants did not appear at calendar call, the court of appeals held that custody orders cannot be entered by default or based "on affidavits". Trial court has obligation to take evidence to determine fitness of party seeking custody and to determine that order will meet best interest of child. The court of appeals states "a court cannot enter a permanent custody order without hearing testimony." Second, trial court erred in allowing nonparent third parties to intervene in custody action where their claim of standing was supported only by their allegation that they had a "parent-child" relationship with the child, the child had resided with them for approximately 6 months at the time the motion to intervene was filed, and they had "bonded" with the child. The court of appeals held that "merely using the phrase "parent and child relationship" is not sufficient to support a finding of standing." Finally, the court of appeals discusses home state jurisdiction for infants without actually making a holding regarding this issue in this case. GS 50A-201 defines home state for a child less than six months in age as the state where the child has resided since birth. In this case, the child was born in Nevada in August, came to NC in September, and a consent custody order was signed in NC in November. The court of appeals stated that it was obvious NC was not the home state of the child at the time that consent order was filed under these circumstances. Also important to note: court of appeals expresses opinion without actually making a holding in this case that a consent order was void where there had been no complaint filed and summons issued.

Third party custody; conduct inconsistent with protected status

- Trial court was correct in concluding that biological mother had engaged in conduct inconsistent with her constitutionally protected status as a parent by creating permanent parent-like relationship between her child and her same-sex partner.
- Where biological parent had waived her protected status, trial court correctly applied the best interest of the child test to determine custody between the parties.

Boseman v. Jarrell., 704 S.E.2d 494 (N.C., December 20, 2010, reversing).

Couple lived together in a same sex domestic partnership when they decided defendant would become pregnant through artificial insemination. The two decided together to become parents and chose a sperm donor with physical characteristics similar to plaintiff, the partner who would not become pregnant. During the pregnancy and following the birth of the child, the parties held themselves out to family and friends as parents of the child and defendant biological parent acknowledged the plaintiff partner as a co-parent of the child. Both parties participated fully in the care and support of the child. The parties also obtained what was referred to as a "second-parent adoption" wherein a trial court declared plaintiff to be the adoptive parent of the child born to defendant. When the child was four years old, the parties ended their domestic partnership. When defendant attempted to limit plaintiff's contact with the minor child, plaintiff filed a custody action seeking joint custody of the minor child. Plaintiff claimed that the adoption established her status as a legal parent of the child. In the alternative, she argued that if the adoption was void, defendant had waived her constitutional right to exclusive custody so the trial court could use the best interest of the child test to determine custody and visitation between the parties. The trial court held that the validity of the adoption could not be collaterally attacked in the custody action, deciding that a request to set the adoption aside needed to be filed in the adoption proceeding. The trial court therefore treated the parties as two parents, applied the best

interest test, and awarded custody rights to both parties. However, the trial court also concluded, in the alternative, that defendant biological parent had waived her constitutional right to exclusive custody by engaging in conduct inconsistent with her protected status.

The court of appeals held that the adoption was valid and operated to confer upon plaintiff the legal status of parent. The supreme court reversed, holding that the adoption was void because it was entered in violation of the express terms of the adoption statute. (That part of the opinion is discussed in section of this update titled “Adoption”). However, the supreme court affirmed the trial court decision that defendant had waived her constitutionally protected status under the facts as found by the trial court. The supreme court adopted the analysis set forth by the court of appeals in *Mason v. Dwinnell*, 190 N.C. App. 209 (2008) and subsequent opinions. In this case, the supreme court held it was clear the biological mother had acted inconsistent with her protected status as a parent when she ceded part of her exclusive custody rights to plaintiff on what was intended to be a permanent basis. Therefore, the supreme court held that the trial court appropriately applied the best interest analysis to determine custody between the parties.

Attorney fees

- Trial court can take judicial notice of the customary rate charged by local attorneys when making the findings of fact necessary to support an award of attorney fees, if the judge chooses to do so, has the necessary knowledge of the customary rate, and believes there is no debate within the local community as to the customary rate.

Simpson v. Simpson, 703 S.E.2d 890 (N.C. App, January 18, 2011).

Defendant filed motion to modify custody order. Trial court subsequently dismissed defendant’s claim based on his failure to show there had been a substantial change of circumstances affecting the welfare of the child since the entry of the existing order. Plaintiff thereafter requested an award of costs and attorney fees. The trial court denied the request for attorney fees, concluding that fees could not be awarded when plaintiff failed to offer evidence regarding the customary rate charged for such matters in the local district. The trial court reasoned that such evidence was necessary to support a finding that the amount of fee charged in this case was reasonable. The trial court specifically stated on the record that the trial court does not have the legal authority to take judicial notice of the customary rate charged by attorneys in the district. The court of appeals remanded the case to the trial court, holding that trial judges are allowed to take judicial notice if they know the customary rate and believe there is no debate within the local community regarding the customary rate. The court of appeals held that the trial judge was correct in holding that evidence of the customary rate is required to support a grant of attorney fees. However, the court of appeals held that the evidence can be supplied by judicial notice, if the trial judge believes it is appropriate to take judicial notice and the judge has the information required to do so. The court of appeals made it clear that a trial judge is never required to take judicial notice. Rather, it is a matter of discretion on the part of the trial judge. The case was remanded for further consideration, due to the fact that the record indicated the trial judge did not understand that judicial notice was an option to establish the missing facts.

Rule 11 sanctions for requesting ex parte custody order

- Trial court appropriately sanctioned defendant mother pursuant to Rule 11 for requesting an ex parte custody order where trial court found that her motion for emergency custody was without basis in law or in fact.

Lamm v. Lamm, 707 S.E.2d 685 (N.C. App., March 1, 2011).

Custody order gave mom primary physical custody of three children and gave dad visitation. On the day mother was supposed to deliver one child to dad for a five-week summer visitation, mom filed a request for an emergency ex parte custody order pursuant to GS 50-13.5. In her request, she alleged there was reason to believe the child had been sexually abused while in the custody of the father. When the matter came on for hearing, the trial court determined there was no basis for the mother's allegations and that her statements were "consistent with a pattern of continuing alienating behavior". The trial court determined that the allegations were made by mother for the purpose of avoiding the child's required visitation with dad. The court of appeals reviewed and affirmed the trial court's award of \$3,500 attorney fees payable to father as the sanction for violating Rule 11.

Relocation; findings established impact of move on child

- Findings of fact in modification order were sufficient to establish a substantial change in circumstances affecting the minor child.
- Findings by trial court established negative effect of relocation on child.

Pass v. Beck, 708 S.E.2d 87 (N.C. App., March 1, 2011).

Custody order gave primary custody to plaintiff dad with visitation to defendant mother. Mother filed motion to modify after dad relocated to Georgia with the child. Trial court found a substantial change in circumstances and modified custody to grant both parents joint custody with mom having primary physical custody. Father argued on appeal that findings of fact did not support the conclusion that there had been a substantial change affecting the welfare of the minor child. The court of appeals disagreed, concluding that the following findings were sufficient to establish that the move was a substantial change affecting the minor child:

- the residence of the father in Georgia was an inappropriate place for the child to visit,
- following the move to Georgia the father increased child's visitation with the paternal grandfather whom the trial court had earlier ordered to stay away from the child,
- the child had resided in the same town in North Carolina since birth and the move to Georgia "put a substantial distance between the minor child and her family and friends", and
- the child "expressed a strong attachment to her mother and friends in North Carolina"

Custody case consolidated with juvenile case; temporary custody order

- Order entered by juvenile court granting temporary custody to dad with supervised visitation to mom was a Chapter 50 temporary custody order.
- Custody order was temporary where the order required a review in four months.
- Temporary custody orders entered pursuant to Chapter 50 are interlocutory orders that do not affect a substantial right. Therefore, the order cannot be appealed until the case is finally resolved.

In the Matter of N.T.S., 707 S.E.2d 651 (N.C. App., March 1, 2011).

Dad filed a Chapter 50 claim for custody against mom. DSS intervened in the custody action because DSS was the custodian of the child at the time the custody case was filed. Thereafter, DSS filed an abuse, neglect and dependency petition in juvenile court. The juvenile court consolidated the two cases. Following numerous disposition hearings, the juvenile court entered an order granting custody to dad, supervised visitation to mom, and ordering the parties to return to court for a review hearing in four months. Mom appealed the order, arguing that the order entered by the trial court was a disposition order subject to immediate appeal pursuant to GS 7B-1001. The court of appeals disagreed, holding that the order was in fact a temporary custody order entered in the Chapter 50 case because the trial judge stated in the order that it was being entered due to a substantial change in circumstances affecting the children which had occurred since entry of the last order. The court of appeals held that the use of the standard for modification required in Chapter 50 cases indicated that the juvenile judge intended to enter a Chapter 50 order rather than an order pursuant to Chapter 7B. According to the court of appeals, the order was temporary rather than a final resolution of the custody claim because the order required review by the court in four months. The court held that a custody order entered pursuant to Chapter 50 is temporary if the order contains a clear reconvening time and that reconvening time is 'reasonably short'. The court held that four months is 'reasonably short' and dismissed mom's appeal as interlocutory.

Need for expert testimony; allocating legal custody; determining whether order is temporary; denying unsupervised visitation to a parent; delegating decision-making authority to therapist; ordering terms of therapy; court costs; Rule 11 sanctions

- Trial court did not need expert testimony to support finding of fact that mother's conduct had caused emotional harm to the children.
- Trial court did not err in awarding sole legal custody to dad, except with regard to medical decision-making. Finding that dad was not a fit and proper person to make medical decisions on his own justified the award of joint legal custody as to medical decisions regarding the children.
- Provisions in order identified by the trial court as 'temporary' did not make the custody order temporary.
- Where limitation on mom's visitation did not result in an absolute denial of visitation, trial court was not required to employ a heightened evidentiary standard before imposing the restrictions.
- Allowing therapists to determine when visitation is appropriate was not an impermissible delegation of authority by the trial court.

- Trial court “went too far in dictating the specifics of the therapist’s work” when it ordered that mom’s visitation not be increased until mom changed her beliefs regarding the alleged sexual abuse of the children and recognized the impact of her behavior on the children.
- Trial court erred in ordering that interest be paid on costs.
- Order for costs had to be remanded where order was not clear regarding basis for amount ordered.
- Rule 11 sanctions were proper against attorney who made allegations in post-judgment motions that were untrue.

Peters v. Pennington, 707 S.E.2d 724 (N.C. App, March 1, 2011). Custody case between mom and dad. Mom alleged dad and his new wife sexually abused children. Trial court determined that the children had not been abused, and determined mother had harmed children by convincing them that abuse had occurred. Following lengthy trial, trial court awarded physical custody to dad, ‘therapeutic visitation’ only for mom (meaning in the presence of therapists and only as deemed appropriate by the therapists), and legal custody to dad, except mom was awarded primary decision-making authority with regard to medical care for the children. The trial court also awarded attorney fees and costs to be paid by mom to dad in the amount of \$266,657 and imposed Rule 11 sanctions against mom’s attorney. The court of appeals affirmed the majority of the order but vacated several provisions, remanding to the trial court for revision. In reviewing the trial court order, the court of appeals held:

1. The trial court did not need expert testimony to support the finding that the children had been harmed emotionally by the conduct of the mother where there was evidence in the record that the children falsely believed they had been abused. According to the court of appeals “a domestic trial judge hears numerous child custody cases each month. They have practical experience and training in human behavior that qualifies them to make causal decisions regarding child custody. They have the ability to select such facts from the evidence to form a chronological chain of acts preceding an effect or event that they determine brought about the effect or event.”
2. The trial court acted within its discretion when it awarded sole legal custody to dad with an exception that all medical decisions regarding the children be made jointly by the parties, where decision was based on the finding that the dad was not “fit and proper” to exercise sole decision-making responsibility with regard to medical decisions.
3. The custody order was a permanent order even though the order specified that mom’s restricted visitation was ‘temporary’ and her visitation would increase when her treatment was complete. According to the court of appeals, the order contained no ‘specific reconvening time’ for the trial court to revisit the issue of custody and the order required a substantial change in circumstances – mother’s completion of treatment – before any term of the visitation would be modified. The same reasoning applied to provisions in the order stating that the restrictions on dad’s ability to make decisions on his own regarding the medical treatment of the children. The order specified that he would be awarded sole decision-making authority when he demonstrated an ability to take on that responsibility. According to the court of appeals, any modification to his authority required a change in circumstances, meaning the provisions were in fact permanent rather than temporary.

4. Trial court's limitation on mom's visitation with the children was not a total denial of visitation. The order allowed visitation in the presence of the therapist, as deemed appropriate by the therapist. Because the order allowed some type of contact, the trial court was not required to 'employ a heightened evidentiary standard' before placing these restrictions on mom. The court of appeals held that while a trial court cannot completely deny visitation without finding a parent unfit, other restrictions can be imposed as required by the best interest of the child analysis.
5. While a trial court cannot delegate control over visitation to the other parent, the court had the authority in this case to delegate decision-making authority to the neutral third-party therapist, including the right to "suspend or terminate counseling, treatment and supervised visitation if he determined that the defendant is not progressing nor working honestly toward improvement."
6. It was inappropriate for trial court to order that mom not have any increased visitation with the children until she acknowledges that father did not abuse the children and accept the fact that her conduct harmed the children. Court of appeals held it was "an unwarranted imposition" to mandate that the therapist make a determination regarding mom's visitation based on mom's beliefs rather than on her behavior.
7. Where order was not clear about how costs were incurred, provision requiring the payment of costs by mom was remanded for additional findings. Court of appeals held that a trial court has no authority to add interest to costs.
8. Trial court did not err in imposing Rule 11 sanctions against mom's attorney based on allegations made in post-judgment motions. Attorney alleged that certain objections and statements had been made during the trial but the trial transcript did not reflect these objections and statements. The court of appeals held that the attorney should have checked the record before making the allegations in writing.

Service of process in Japan; home state jurisdiction; temporary absence

- Service of process was accomplished in Japan when service complied with the Hague Convention on International Service of Process.
- Fact that actual summons served in Japan was dormant at the time of service did not make service invalid where all appropriate alias and pluries summons actually had been issued in North Carolina.
- North Carolina was home state of children because they had lived in NC for 2 years before traveling with their parents to Japan.
- Trip to Japan was a temporary absence, even though children had been in Japan for almost 6 months by the time the custody action was filed in NC.

Hammond v. Hammond, 704 S.E.2d 74 (N.C. App, March 1, 2011). Parents resided together with two children in North Carolina for two years. In May 2008, the family traveled to Japan to visit defendant mother's family. After being in Japan for three weeks, mom announced that she was not returning to North Carolina and that she desired to end the marriage. Dad returned to North Carolina and in November 2008 filed this action for custody, child support and equitable distribution. Mom filed a motion to dismiss based on lack of personal jurisdiction due to improper service of process and lack of subject matter jurisdiction over the custody claim pursuant to the UCCJEA. The trial court denied the motion to dismiss and the court of appeals affirmed. According to the court of appeals, service of process on mom in Japan was appropriate

where service complied with the Hague Convention on Service of Process. Both the US and Japan are signatories of the Hague Convention on Service, so plaintiff was required to comply with those provisions. Service in this case was accomplished through the Japanese Ministry of Foreign Affairs and was accomplished in accordance with Japanese law. The court rejected defendant's argument that service was invalid because the summons actually served on defendant in Japan was 158 days old. The court found that plaintiff had alias and pluries summons issued in a timely manner in North Carolina, but the first summons was the document actually delivered to defendant. The court of appeals held that there was no practical way to effectuate service in Japan in the 60 day time frame of Rule 4 and the service was accomplished within the time frame required by Japanese law.

The court of appeals also held that North Carolina remained the home state of the children at the time the action for custody was filed, even though the children had been in Japan with mom for almost 6 months at the time of filing. The court of appeals agreed with the trial court conclusion that the trip to Japan was intended to be a temporary absence, meaning North Carolina remained the home state of the children despite their time away from the state. The fact that the absence was temporary was established by husband's evidence that the family had taken several trips to Japan in the past, with all trips being temporary visits to spend time with family, husband's testimony that he had no reason to believe this trip was any different from those earlier trips and that mom said nothing about ending the marriage until the family had been in Japan 3 weeks, dad had applied for a new job in North Carolina immediately before the trip to Japan, and the parties had jointly enrolled their children in a new private school in North Carolina for the year following the trip and had paid the tuition in full.

Custody and child support action filed before separation

- Trial court erred in dismissing plaintiff's claims for custody and child support after concluding that the court has no subject matter jurisdiction to consider these claims when the parents continue to reside together in the same household with the children.
- Mother stated a claim for custody and child support when she alleged in her complaint that she planned to separate from father by moving out of the residence and that she believed it was in the best interest of the children for the trial court to address custody and child support before she moved.

Baumann-Chacon v. Baumann, _S.E.2d_ (N.C. App, May 17, 2011). Parents resided together with two children when plaintiff mother filed a complaint for custody, child support, postseparation support, alimony and attorney fees. The trial court concluded that it had no subject matter jurisdiction to address any of those claims before the parties separated. Court of appeals reversed, holding that nothing in Chapter 50 requires a physical separation of the parties before the trial court can address custody and child support. The court noted that GS 50-13.4(e) authorizes the court to award possession of the marital home in addressing child support, although the court also noted that the mother in this case did not ask the court to award possession of the residence. The court stated that while "in most instances, the entry of a formal order addressing child custody and child support issues would be unnecessary in the event that the children's parents are living together and providing adequate support for their children, we are able to foresee situations, such as the one at issue here, where that might not necessarily be the case. In particular, there might be merit in having child custody and child support issues adjudicated prior to separation in order to ensure that the children of the separating parents are properly addressed."

Juvenile court jurisdiction; grandparent custody claim; standing and conduct inconsistent

- Trial court had subject matter jurisdiction to consider custody claim filed by grandparents because juvenile court had terminated jurisdiction.
- Order by juvenile court returning custody of children to the parent, relieving DSS and GAL of any further responsibility, and ordering no further action by the parent was an order terminating juvenile court jurisdiction as contemplated by GS 7B-201(a).
- Grandparents have standing to file for custody pursuant to GS 50-13.1. No further relationship need be shown to establish standing of relatives.
- Facts established by grandparents were insufficient to show that mom had acted inconsistent with her protected status as a parent. Therefore, the trial court erred in conducting a best interest analysis to determine custody.

Rodriguez v. Rodriguez, _S.E.2d_ (N.C. App, April 19, 2011). Plaintiff paternal grandparents filed claim seeking custody of their grandchildren pursuant to GS 50-13.1. At the time of filing, the children were in the custody of DSS pursuant to an order entered in an abuse, neglect and dependency proceeding. However, the trial court took no action on the Chapter 50 custody case until after an order was entered in the juvenile case returning the physical and legal custody of the children to defendant mother, ending involvement by both DSS and the GAL, and including no provision requiring any further action or review by the juvenile court. According to the court of appeals, this order had the effect of terminating the jurisdiction of the juvenile court. Therefore, following entry of this order by the juvenile court, the trial court had subject matter jurisdiction to proceed on the Chapter 50 custody claim. The trial court awarded custody of the children to the grandparents after concluding defendant mother had waived her constitutional right to exclusive care, custody and control of her children due to conduct inconsistent with her protected status. On appeal, mom argued grandparents did not have standing to bring the action because their complaint failed to allege a relationship between the children and grandparents sufficient to grant standing. The court of appeals rejected mom's argument and held that the grandparents had alleged standing by simply alleging they were grandparents. The mother also argued that the trial court erred in concluding that she had engaged in conduct inconsistent with the protected status and the court of appeals agreed. According to the court of appeals, the findings by the trial court on this issue were insufficient to establish waiver by clear and convincing evidence. While the children had been taken into DSS custody, there had been no adjudication of abuse or neglect. The children had been adjudicated dependent based upon the mother's inability to care for the children due to severe emotional issues relating to the "untimely traumatic death of the children's father" and emotional issues related to the physical abuse inflicted upon her by the children's father before his death. The court of appeals held that the adjudication of dependency was not enough alone to support the trial court's determination of conduct inconsistent. The court of appeals noted that the mother had complied with all of the orders of the trial court and did not expose the children to any type of danger. The only other findings made by the trial court were that the mother is "high-strung, easily angered and tends to allow her voice to rise as she becomes angry." Dissent argues trial court findings were sufficient to support conclusion that mother had waived her constitutional protection.

Jurisdiction to modify order from another state; relocation

- Trial court had jurisdiction to modify a Michigan custody order where neither party remained in Michigan and North Carolina was the home state of the children at the time the motion to modify was filed.
- Trial court correctly determined there had been a substantial change in circumstances affecting the children since the entry of the last custody order.
- Trial court findings were sufficient to establish impact of father's relocation on the children where findings showed father was moving due to a change in employment and that his new job would allow him "to support his children financially."

Crenshaw v. Williams, _S.E.2d_ (N.C. App, April 19, 2011). Child custody order entered in Michigan gave parents joint custody. Subsequently, dad moved to North Carolina with the children and mom moved to Georgia. Dad filed for modification. Trial court modified custody and mom appealed. Court of appeals held that trial court had jurisdiction under the UCCEA to modify the Michigan order pursuant to GS 50A-203 because both parents had left Michigan and North Carolina had become the home state of the children by the time father filed the motion to modify. The court of appeals rejected mom's argument that the trial court based the custody determination solely on considerations of the parties' relative standards of living. The court of appeals held that while it is not appropriate for the court to base custody decisions entirely on the relative financial circumstances of the parties, the trial court should compare the standards of living of the parties along with all other circumstances. The court of appeals also rejected mom's argument that the trial court failed to make adequate findings of fact about the impact of father's proposed relocation on the children. The trial court found that father lost his job in Charlotte and found new employment in Memphis. According to the court of appeals, the finding by the trial court that "the prospects for future employment in this position are good and his monthly salary of \$20,000 will allow him to support the children financially" was sufficient to show the trial court properly considered the impact of the move on the children in determining whether the move would be a substantial change in circumstances.

Modification; Waiver of Changed Circumstances

- Stipulation by parties that custody order is subject to modification without a showing of changed circumstances is ineffective. Trial court cannot modify custody order without first finding there has been a substantial change in circumstances affecting the welfare of the child.

Hibshman v. Hibsham, _S.E.2d_ (N.C. App, May 17, 2011). Child custody order entered that granted mom primary physical custody during school year, conditioned upon the children being enrolled in a certain school. Both parties stipulated at the time the order was entered that if the children did not remain enrolled in the school, the custody order could be modified by the court without a finding of a substantial change in circumstances as required by GS 50-13.7. When mom moved to South Carolina, dad filed a motion to modify. Pursuant to the stipulation, the trial court entered a new custody order based on the best interest of the children without making findings regarding changed circumstances. Mom appealed, arguing that the changed circumstances requirement cannot be waived and the court of appeals agreed. According to the court of appeals, the requirement in GS 50-13.7 that no custody order be reconsidered until there has been a substantial change in circumstances affecting the children is intended to protect children from continuous, contentious litigation by encouraging the finality of custody determinations. As the statute is intended to protect people other than the parties to the litigation,

the statutory mandate cannot be waived by the parties. For the same reason, the doctrine of equitable estoppel cannot be invoked in response to a party's reliance upon the statutory requirements.

Third party custody; conduct inconsistent; standard of proof

- Trial court order clearly indicated trial court used correct standard of proof – clear, cogent and convincing evidence - to determine father had waived his constitutional right to custody by engaging in conduct inconsistent with his protected status.
- Findings of fact were sufficient to support the conclusion that father had waived his constitutional right to exclusive care, custody and control of his children.

Leadman v. Leadman, unpublished opinion, _S.E.2d_ (N.C. App, May 17, 2011). Trial court granted primary physical custody to grandmother and father appealed. Court of appeals held that order showed clearly that the trial court found facts relating to waiver by clear, cogent and convincing evidence. In addition, court of appeals held that the following facts were sufficient to support the conclusion father had waived his protected status:

- 1) Lack of contact with children
- 2) Repeated violations of the law in the presence of his children (driving while his license was revoked for DWI, with children in the car, and committing acts of domestic violence in presence of children)
- 3) Failure to provide financial support for the children
- 4) Violent and abusive conduct towards mother of children
- 5) Delegation of the role of primary custodian to grandmother throughout the lives of both children

Psychological examination; suspending visitation

- Trial court “undoubtedly” has authority to order a psychological examination of a parent when a custody claim is pending and to suspend the parent's visitation pending the outcome of the evaluation.
- However, trial court must give party an opportunity to be heard concerning the identity of the mental health professional ordered to perform the evaluation.

Church v. Church, unpublished opinion, _S.E.2d_ (N.C. App, June 7, 2011). In custody case, trial judge suspended visitation by plaintiff father and ordered that he undergo a mental health evaluation by a specified physician. On appeal, the court of appeals rejected plaintiff's argument that the trial court exceeded its authority in ordering the evaluation. The court of appeals “declined to provide a detailed discussion of those facts [justifying the evaluation] in the interest of protecting the privacy of the children and the parties,” but held that the record contained sufficient evidence to support the order. However, the court of appeals remanded the case to the trial court due to the fact that the record did not indicate plaintiff was given an opportunity to express an opinion about the identity of the mental health professional that would be ordered to perform the evaluation. According to the court of appeals, the plaintiff does not have the authority to select an evaluator but he does have the right to be heard concerning the selection.

Child Support

Cases Decided September 21, 2010 and June 7, 2011

UIFSA; modification of arrears accrued under order from another state

- Trial court erred in reducing amount defendant owed in support accrued under child support order entered in Michigan.
- When law of state entering order provides that child support payments vest when they become due and cannot be modified, full faith and credit requires that the full amount of arrears be enforced.

State ex. rel. Benford v. Bryant, 701 S.E.2d 387 (N.C. App., November 16, 2010).

Child support order entered in Michigan. Mother subsequently registered order in NC and trial court ordered payment of only a portion of the arrears that had accrued pursuant to the terms of the Michigan order. Court of appeals reversed, holding that UIFSA and full faith and credit require the court to enforce the full amount of arrears. Where Michigan law provides – as does NC law – that vested child support arrears cannot be modified, the North Carolina court had no authority to modify the arrears by ordering enforcement of less than the full amount of accumulated support.

Income; averaging past to determine present income

- Where defendant failed to submit financial information for 2009, trial court did not err in using records from 2007 and 2008 to determine defendant's income at time of trial in 2009.
- Trial court did not impute income to defendant when court used average income from past years to determine present income.

Moore v. Onafowora, 703 S.E.2d 744 (N.C. App., December 21, 2010).

Trial court used financial records from 2007 and 2008 to determine income for defendant father in 2009. Defendant failed to provide documentation of present income as required by subpoena, did not respond to Request for Production of Documents served by plaintiff, and did not provide financial affidavit as required by local rules. Trial court used information from previous years to determine the past average income of defendant and determined an amount of present income based on that same information. Court of appeals rejected defendant's argument that trial court imputed income to him without finding bad faith. Rather, according to the court of appeals, the trial court appropriately used average from past years to determine amount of present actual income.

Jurisdiction to modify order from another state

- Trial court erred in modifying Michigan support order where party filing request for modification resides in North Carolina but other parent resides in Georgia.
- UIFSA provides that, when both parties have left the state which entered the support order, the party seeking modification must file action for modification in state where other party resides.

Crenshaw v. Crenshaw, _S.E.2d_ (N.C. App, April 19, 2011). Child support order entered in Michigan. Subsequently, Dad moved to North Carolina with the children and mom moved to Georgia. Dad filed for modification of custody and child support in NC. Trial court modified both orders and mom appealed. Court of appeals held that while NC court had jurisdiction to modify custody, NC does not have jurisdiction to modify child support. GS 52C-6-602 and -609 require, once both parties have left the state which issued the order, the party seeking modification of an order file that request in the state where the non-moving party resides. The trial court in this case did not have jurisdiction to modify the Michigan order because mom resides in Georgia.

Retroactive support; attorney fees

- Trial court must base amount of retroactive support on evidence of actual expenses paid by custodial parent before action for support was filed.
- When order addresses ED, alimony and child support, trial court must specify amount of fees attributable to alimony and support to ensure no fees are awarded for services rendered on the ED claim.

Robinson v. Robinson, 707 S.E.2d 785 (N.C. App, March 15, 2011). Plaintiff filed action of ED, alimony, child support and attorney fees. Defendant filed an answer but did not attend hearing. Trial court awarded plaintiff retroactive child support. The order stated that the amount was based on child care expenses and the child support guidelines. Defendant argued that the trial court erred in awarding retroactive support without evidence of actual expenses paid on behalf of the children by plaintiff before the filing of the action and the court of appeals agreed. Without mentioning the provision in the Child Support Guidelines stating that retroactive support can be based either on actual expenses paid or on the Guidelines, the court of appeals held that a party seeking retroactive support must present evidence of past expenditures made on behalf of the child before the trial court can award retroactive support. The court of appeals remanded the issue to the trial court for further findings of fact. The court of appeals also remanded the trial court's award of attorney fees to plaintiff. Trial court order made findings as to total attorney fees incurred by plaintiff and based the attorney fee award on those findings. The court of appeals held that because fees cannot be awarded for the ED claim, the trial court order must make specific findings to show the amount of the fee associated with alimony and support and base the award of fees only on the time associated with alimony and child support.

Custody and child support action filed before separation

- Trial court erred in dismissing plaintiff's claims for custody and child support after concluding that the court has no subject matter jurisdiction to consider these claims when the parents continue to reside together in the same household with the children.
- Mother stated a claim for custody and child support when she alleged in her complaint that she planned to separate from father by moving out of the residence and that she believed it was in the best interest of the children for the trial court to address custody and child support before she moved.

Baumann-Chacon v. Baumann, _S.E.2d_ (N.C. App, May 17, 2011). Parents resided together with two children when plaintiff mother filed a complaint for custody, child support, postseparation support, alimony and attorney fees. The trial court concluded that it had no subject matter jurisdiction to address any of those claims before the parties separated. Court of appeals reversed, holding that nothing in Chapter 50 requires a physical separation of the parties before the trial court can address custody and child support. The court noted that GS 50-13.4(e) authorizes the court to award possession of the marital home in addressing child support, although the court also noted that the mother in this case did not ask the court to award possession of the residence. The court stated that while "in most instances, the entry of a formal order addressing child custody and child support issues would be unnecessary in the event that the children's parents are living together and providing adequate support for their children, we are able to foresee situations, such as the one at issue here, where that might not necessarily be the case. In particular, there might be merit in having child custody and child support issues adjudicated prior to separation in order to ensure that the children of the separating parents are properly addressed."

Imputing income

- Trial court did not err in concluding defendant father had acted in bad faith disregard of his child support obligation when his voluntary conduct lead to his loss of employment.
- Trial court did not err in using defendant's income from his last job in determining amount of income to impute despite evidence that he would not be able to earn that amount in the future.
- Trial court did not err in considering assets defendant received in ED judgment when considering his ability to pay to support.

Metz v. Metz, _S.E.2d_ (N.C. App, June 7, 2011). Defendant father worked as a nurse anesthetist earning \$18,867 per month before he was convicted of sexually assaulting one of his children. The conviction resulted in his loss of employment as well as the loss of his license to work as an anesthetist. The trial court determined his income for the purpose of setting child support by imputing income based on the conclusion that defendant's voluntary actions caused his loss of employment, thereby evidencing his deliberate disregard for his obligation to support his children (bad faith). The trial court set support based on defendant's prior income of \$18,867 per month. The court of appeals affirmed, rejecting defendant's claim that because the conduct that lead to his job loss was not job related the trial court should not be able to find he acted 'voluntarily' to cause his unemployment. The court of appeals held that the 'foreseeable result' of his voluntary conduct was job loss and that the findings by the trial court were sufficient to support the decision to impute income in the amount of his pay at his last job. The court of appeals also rejected defendant's argument that the trial court erred in concluding he had the

ability to pay support as ordered when the findings established he was unemployed except for some minimum wage work. The court of appeals held that the trial court conclusion concerning ability to pay was supported by findings in the order concerning assets acquired by defendant as a result of the ED judgment previously entered in the case.

Adoption

Cases Decided September 21, 2010 and June 7, 2011

Adoption by domestic partner void

- Trial court did not have jurisdiction to grant adoption to unmarried person with retention of rights by biological parent.

Boseman v. Jarrell, 704 S.E.2d 494 (N.C. , Dec. 20, 2010).

Facts: The court of appeals, in *Boseman v. Jarrell*, ___ N.C. App. ___, 681 S.E.2d 374 (2009), upheld the trial court's use of the "best interest" standard in a custody dispute between a biological parent and her domestic partner who had adopted the child, holding that the biological parent could not challenge the validity of the adoption because the time for challenging the adoption had expired.

Held: Reversed in part and modified and affirmed in part.

1. The supreme court held that the adoption was void *ab initio*, because the trial court that granted the adoption lacked subject matter jurisdiction to allow adoption by someone other than a spouse while the biological parent retained his or her parental rights. The trial court did not have authority to waive that aspect of the adoption statute.
2. The supreme court upheld the trial court's application of the best interest standard and its award of joint custody, however, holding that the biological parent had "acted inconsistently with her paramount parental status" by "intentionally creating a family unit in which defendant permanently shared parental responsibilities with plaintiff."